Before the
Federal Communications Commission
Washington, D.C. 20054

In the Matter of	**)**	
	)	
Implementation of Section 621(a)(1) of the	**)**	
Cable Communications Policy Act of 1984 as	**)**	MB Docket No. 05-311
amended by the Cable Television Consumer	**)**	
Protection and Competition Act of 1992	**)**	

COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

The Broadband Service Providers Association ("BSPA") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking in the captioned proceeding.[1]

INTRODUCTION AND BACKGROUND

BSPA represents competitive network operators that have had significant experience with existing cable franchising regulations. The BSPA was formed in 2002 to represent a new segment of the communications industry that emerged following passage of the Telecommunications Act of 1996 ("1996 Act"). Broadband service providers ("BSPs") deploy and operate new, facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.[2] While today's BSPs

[1] *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (rel. Nov. 18, 2005).

[2] The current members of BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Knology, Sigecom Communications, PrairieWave Communications, and SureWest Communications.

represent a smaller segment of the industry -- over forty networks that serve more than 1.2 million customers -- they have achieved significant market share where they operate.

BSPs provide the first working examples of competitive next generation integrated systems. These are the same system structures that cable and telephone incumbents are now rebuilding and upgrading their networks to. From a new entrant's standpoint, BSPs have experienced the full range of competitive responses that other new distribution entrants are facing today as they deploy competitive networks. Thus, the market experience of BSPs provide important insights into the competitive issues that must be addressed by the FCC and Congress as they promote head-to-head facilities-based competition and continue to evaluate and determine the most appropriate market structure to serve consumers and to ensure economic growth.

DISCUSSION

A. Any Changes to the Franchising Process Must Apply Equally to Current Competitive Operators and Potential New Entrants.

During the past 10 years BSPs have negotiated a significant number of competitive cable franchises. The franchising process experienced by the BSPA members was long, expensive and laborious. BSPs experiences provide important insight into the range of workable and unworkable franchise concepts. Evaluation of existing franchise provisions and changes to the franchising process and specific franchise requirements are necessary to guarantee that there are no significant barriers to entry or network expansion.

It is not the BSPA's objective in this proceeding to argue for specific changes. The BSPA's primary concern is that any changes that are implemented provide the same cable franchise regulatory relief to all current competitive operators and potential new entrants. The expanded competition currently sought by the FCC and Congress will not just be generated from upgraded incumbent local exchange company ("ILEC") operations. Major new video competition is expected from the ILEC segment. However, the ILEC segment alone will not produce all of the timely geographic coverage and innovation that the market needs. Other forms of new network build, regardless of technology or ownership, require the same opportunity to benefit from franchise reform as may be provided to upgrade a legacy telephone network for the provision of video services.

In particular, it is imperative that existing competitive video franchises are made subject to whatever rules the Commission adopts with respect to the franchising process applicable to new entrants. This will ensure there is no regulated competitive advantage for any new competitive provider of similar services.

Competitive BSPs have existing video franchises in multiple areas. These video franchises were negotiated under highly competitive conditions with significant add-ons and financial requirements. If there is a new standardized franchising system developed nationwide, the Commission must recognize and address the inequities that would result if new competitive franchises are governed by the new system, while existing competitive franchises remain subject to provisions historically mandated by Local Franchising Authorities ("LFAs") that the Commission may determine are impermissible.

Legacy competitive franchises must be dealt with to properly adhere to the mandates and policy considerations of the 1996 Act. These existing competitive franchisees should not be penalized because they were the first to risk competition with the incumbent cable operator. If a new competitor does not have the same franchise-related local costs and requirements to provide service, the higher costs faced by the original competitive BSP could result in a form of stranded investment of the very companies whose entry exemplify the goals of the 1996 Act.

B. Level Playing Field Provisions and Associated Build-out Requirements Are Significant Impediments to Competition.

The single largest issue in today's video franchising regime is build-out requirements that exist as a level playing field ("LPF") statute or similar requirement in an incumbent's heretofore monopoly franchise agreement. In general, LPF provisions require that new entrants accept all the responsibilities and obligations of the incumbent cable operator. Build-out requirements do not create a true level playing field. Build-out requirements may have been appropriate when an exclusive franchise was being issued, but they have no place in a competitive market. They primarily serve to delay or limit the growth of competition by negatively impacting the availability or use of capital.

Incumbent cable operations have had decades of monopoly franchises for terrestrial video services. In this environment, the incumbent cable operators have been able to extend their networks into low-density service areas using cash flow from operations. The economic decision to build in a low-density area could be based on the assumption that the incumbent would be the only provider of an equivalent cable video service. This monopoly position and available funding allowed incumbents economically to extend into many areas that they would have chosen to ignore if they had faced a competitor that could have potentially split the market. In many cases the incumbent cable operator also had the ability to stop the network extension when it would not produce an economic return.

When a new network operator is forced to comply with a build-out that is equal to the existing incumbent cable footprint, it is forced to a build on a timeframe and in geographic areas where the cost to build and customer density will likely produce an economic loss for both network operators. Capital will not freely flow into network investments that will produce a projected loss in significant portions of the build. The superficial appeal to fairness masks the real intent of such provisions: to protect the incumbent's market position. No new entrant – without any market share – can be viable if it must undertake the same build-out responsibilities and obligations of an incumbent with market power.

Upgrading existing systems produces a similar situation when the footprint of the existing system does not perfectly match the geographic territories of an existing cable franchise authority. To comply with a full build-out requirement the network operator would have to go beyond the footprint of the existing network and build new network extensions. This could cause a loss on the network extension investment particularly if it were being forced to cover a geographic territory already served by multiple providers of any of the core services.

Build-out requirements also restrict the growth of competition that could be created by incremental expansion of existing networks into adjacent franchise territories. In our current structure, a franchise boundary may run down the middle of a major street. Consumers on one side of the street benefit from full competition while consumers on the other side do not. The franchise build-out requirements block the service expansion until the network operator can find the financial commitment to build out the entire adjacent franchise.

Build-out requirements have been used intentionally to block the emergence of competition. Franchise authorities subject to LPF statutes have been threatened with lawsuits from incumbent cable operators if they do not comply with the incumbent cable operator's definition of an LPF. The threat of a lawsuit can also cause the franchise authority to require build-out requirements even where they would prefer not to do so.

For example, an LPF suit was brought by Insight Communications against the City of Louisville and Knology. Litigation in this matter took more than three years. The City of Louisville and Knology eventually won the suit, but the case was settled with no damage award.

More importantly, the extensive delay resulted in Knology pursuing other market investments and declining to enter the Louisville market. Thus the suit was an excellent competitive investment by Insight: Full wireline competition has still not emerged in Louisville because of the incumbent's strategic use of litigation over an LPF provision.

It is worth noting that a significant number of original competitive franchises have been renegotiated or converted to an Open Video System ("OVS") model because the competitive network operator could not economically comply with the build-out requirements. Rather than force the new competitor into default and the potential reduction of existing competition, some LFAs have renegotiated to effectively eliminate the original build-out requirement. From one perspective this suggests that issues can be worked out in the current regulatory structure. However, it also provides repeated examples of the current build-out requirements as being either unreasonable or uneconomic.

The fear of redlining is a frequent argument to justify build-out requirements. The most significant factors affecting where a wireline network will be built relate to the cost of construction and the density of the population that will be served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area.

It should also be noted that once a core network infrastructure has been built the incremental costs of extending into most adjacent markets are very favorable. There is a strong financial incentive to extend the application of the core network as far as is economically feasible. Moreover, the potential economic incentives to serve or not serve a particular population are dramatically different for new networks as compared to some legacy networks that only offered a broadband connection. The next generation bundled network typically has a minimum of two services that are relevant to any population group. Consumers that may not be highly interested in a broadband connection offer have very high take rates for video and voice service. Younger generations that frequently rely on a cell phone without having access to wireline phone service have high take rates for video and broadband. New wireline networks that address our national priority to expand broadband capacity will not be built for the sole purpose of broadband service. They are built based on the economics of offering all services. Therefore, the national priority to expand broadband capacity for subsequent use is served by creating a better franchising regime for the deployment of video services.

Today's networks rely on multiple service revenue streams to build a financially sound business model. MVPD video carriage and the ability to offer video over broadband services are integral parts of any successful business plan. Video-based revenues are necessary for new networks to be profitable and thus assure the availability of financing. Without this assured ability to offer video services the investment in new networks will be impaired.

New networks also derive significant revenues from telephone services, but there are distinct differences between the local requirements that may be imposed on the provision of competitive telephone service and the ability to offer competitive video services. Compared to the local video franchising process, there are only limited regulatory impediments to a facilities-based operator offering voice services. Therefore, incumbent cable operators can offer new competitive phone service through network upgrades in any geographic manner or market, without input or oversight by local governmental authorities. In contrast, both legacy phone companies and new network operators face significant and daunting obstacles to the provision of video services arising from the local franchising process and its associated requirements.

C. <u>Franchises Also Typically Contain A Number of Additional Provisions that are Inappropriate.</u>

The current franchising process can also restrict the use of scarce capital by diverting it to other non-network capital applications. The current process allows the franchising authority to bargain for the use of capital for a host of a city's infrastructure needs and projects when the primary use of available capital should be directed to bring the benefits of competition to consumers. Examples of municipal capital requirements can include, among others, financing for municipal Internet systems, PEG-related capital for city broadcasting facilities, and traffic light control systems. The historical contributions in these areas made by the incumbent cable operator were frequently funded out of operations, not out of capital raised to build the network. This requires that a new entrant match the historical contributions made by the incumbent funded out of operations, creating capital requirements on a competitive provider that the incumbent did not face. This hardly results in a "level playing field."

There are number of significant provisions in the current video franchise process that nonetheless should be preserved. These provisions include:

1. The capped (5%) franchise fees paid to local government based on subscriber revenues.
2. The local authority to manage the use of right-of ways with appropriate and reasonable process and related fees.
3. The requirements for reasonable PEG channel carriage.
4. Local authority to govern customer service compliance.
5. Compliance with all public safety requirements related to the communications network.

CONCLUSION

The BSPA welcomes the Commission's examination of the franchising process. The BSPA's primary concern is that any changes that are implemented with respect to the franchising process apply equally to all current competitive operators and potential new entrants. The areas of greatest concern in the current regime are level playing field statutes and provisions and associated build-out requirements. An additional area of concern that should be addressed is the imposition of extraneous capital requirements unrelated to the direct construction of a network.

Respectfully submitted,

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